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No. 249

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

GEORGE DUTTON, *et al* *Petitioners*

v.

CITIES SERVICE DEFENSE CORPORATION *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The citations to Opinions of the District Court and in the Court of Appeals are set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

The pertinent provisions of the Fair Labor Standards Act and the Portal-to-Portal Act of 1947, involved in these consolidated cases are referred to in the Petition, at page 3 thereof, and are set out in Appendix A at pages 21-25 of the Petition.

QUESTIONS PRESENTED

Petitioners have elected to present the issues in these consolidated cases in the form of four questions, but Respondent respectfully submits that all four of said questions are embraced within the following question:

Does Section 2 of the Portal-to-Portal Act of 1947, bar ALL claims arising prior to the effective date of said Act for overtime compensation under the Fair Labor Standards Act for any activity (ALL ACTIVITIES), except when such activity is made compensable by either (1) an express provision of a written or non-written contract, or, (2) a custom or practice covering such activity?

STATEMENT

Petitioners' Statement, commencing on page 3 of the Petition, is substantially correct, but Respondent supplements said statement by the following:

Petitioners have failed to explain the nature of the amendment made to their complaints in the District Court following passage of the Portal-to-Portal Act. These consolidated cases were pending when the Act was passed. Respondent immediately amended its answer to plead the provisions of the Act, and particularly Sections 2 and 9 thereof (R.9-12). Whereupon, the Petitioners amended their complaints by alleging, among other things, that "the causes of action of the various plaintiffs involve a liability arising out of the failure of the employer to pay

for an activity . . . engaged in prior to May 14, 1947, when said activity was compensable by either a contract, custom or practice"; and by further alleging that "the activity for which the action is brought was engaged in by the various employees during the portion of the day with respect to which it was so made compensable as above set out" (R.14).

Petitioners offered no evidence to sustain either of the quoted allegations and neither the Master nor the District Court made any finding of fact that sustains them; but, on the contrary, expressly found that such activities were not compensable either by contract, custom, or practice (Par. 7, R.233, 234).

Respondent does not agree with the remark made in Petitioners' Statement that "the activities in question were so closely related to their primary activities as to be an integral part of them"; nor with the implication that, if found to be so, they would not be barred by Section 2 of the Portal-to-Portal Act.

SUMMARY OF ARGUMENT

(1)

The burden was on the Petitioners to prove the essential allegations of their Amended Complaint which alleged that the activities involved in those consolidated cases were made compensable by "either a contract, custom or practice" and that such activities were engaged in by the Petitioners during the portion of the day with respect to which they were so made compensable. They wholly failed to prove these allegations and the Master, the District Court, and the Circuit Court of Appeals for the Eighth Circuit, all so found.

(2)

Even though the Master and District Court found that all of the activities involved herein were "working time", nevertheless a recovery therefor is barred under the provisions of Section 2 of the Portal-to-Portal Act, because not made compensable by contract, custom or practice.

(3)

There is no merit in Petitioners' contentions that Sections 2 and 4 of the Portal-to-Portal Act are substantially identical in meaning and language and that "identical problems arising under them demand identical treatment".

(4)

The Circuit Court of Appeals for the Eighth Circuit correctly construed the provisions of Section 2 of the Portal-to-Portal Act and properly held that all of the activities involved in these cases are barred under its provisions; and there is no conflict between its decision in these cases and the decisions in other Circuits cited by Petitioners, and no conflict with this Court's decision in *Steiner* v. *Mitchell, infra.*

(5)

The decision of the Circuit Court of Appeals for the Eight Circuit in the instant cases does not conflict with the decisions of this Court in *Armour & Company* v. *Wantock, et al, infra,* and *Skidmore* v. *Swift & Co., infra,* for the reason that the latter two cases were decided before the enactment of the Portal-to-Portal Act and were not subject to the provisions of that Act; but the claims and activities involved in the instant cases are subject to its provisions and a recovery therefor barred by Section 2 of the Act.

(6)

Petitioners' argument that the result reached by the Eighth Circuit Court of Appeals in the instant cases presents a problem of great importance in the future administration of the Fair Labor Standards Act and the Portal-to-Portal Act is wholly without merit. This Court, in *Steiner* v. *Mitchell*, *infra*, has already set a guidepost for the future determination by the Federal Courts of claims or issues arising under Section 4 of the Portal-to-Portal Act; and the decision of the Eighth Circuit in the instant cases is in harmony with the meaning and application of Section 2 of the Portal-to-Portal Act as expressed by this Court in the Steiner Case.

ARGUMENT

I

THE PETITIONERS HAVE FAILED TO SUSTAIN THE BURDEN OF PROVING THE ESSENTIAL ALLEGATIONS OF THEIR AMENDED COMPLAINT

It was by virtue of the allegations of Petitioners' Amended Complaint alleging that (1) "the causes of action of the various plaintiffs involve a liability arising out of the failure of the employer to pay for an activity . . . engaged in prior to May 14, 1947, when said activity was compensable by either a contract, custom or practice" and (2) that "the activity for which the action is brought was engaged in by the various employees during the portion of the day with respect to which it was so made compensable as above set out" that the Circuit Court of Appeals for the Eighth Circuit, in its opinion in 197 Fed. (2) 458, reversed the action of the District Court in dismissing, on March 5, 1951, Petitioners' Complaints and causes of action herein for want of jurisdiction, the Circuit Court of Appeals holding that the Petitioners were entitled to an opportunity to prove what they had alleged (Appendix B, Petition, 28). Yet, although Petitioners have been able to keep these cases on the docket for ten years after the effective date of the Portal-to-Portal Act, solely by reason of the foregoing allegations contained in their amended complaint, they wholly failed on the trial before the Master to prove such allegations and the Master so found in his Findings of Fact (Par. 7, R. 133), which were adopted by the District Court (R. 334). On this issue the Circuit Court of Appeals for the Eighth Circuit, in reversing and remanding this cause for dismissal, said:

> "In our present cases the claimants have failed to establish that their claims fall within any of the

exceptions of Section 2 (of the Portal-to-Portal Act). No contract, custom or practice to pay for the activity claimed has been established. The Master and the trial court so found. We agree. (Appendix B, Petition,37.)

II

DESPITE A FINDING OF FACT AND A CONCLUSION OF LAW THAT ALL OF THE TIME INVOLVED IN THESE CASES CONSTITUTED WORKING TIME UNDER THE DECISION OF THIS COURT IN SKIDMORE V. SWIFT & CO., INFRA, A RECOVERY THEREFOR IS BARRED BY SECTION 2 OF THE PORTAL-TO-PORTAL ACT

Having failed to establish the essential allegations of their amended Complaint, the Petitioners now fall back upon the contention and argument that, since the Master and District Court found that all of the activities for for which judgments were rendered herein constituted work or "working time", it follows: (1) that such activities are an integral part of the principal activities of the respective claimants and (2) therefore are not barred by the provisions of Section 2 of the Portal-to-Portal Act. This contention is shown by the following quotations taken from the Petition:

> "These employees believe it fair to say that the activities in question were so closely related to their primary activities as to be an integral part of them." (Petition,7.)

> "They (such activities) are so necessary to and so closely related to the principal activity as to be an integral part of it and compensable as such." (Petition,18.)

> "In the instant case, the activities in question have been found as a fact to be necessary to the performance of the principal activity *and an integral part of it.*" (Petition,17.)

That part of the last statement which we have placed in italics is misleading because it says that the Master and District Court found as a fact that the activities upon which these claims are based were "an integral part" of the principal activity of each of the claimants. There is no such finding of the Master or District Court and we challenge counsel for Petitioners to cite any finding of fact in the record to sustain the challenged statement. The record will disclose no use of the expression "integral part of the principal activity" by either the Master or the District Court.

The findings of fact which the Master and District Court made with respect to these various activities were simply that they constituted work or "working time". (Par. A-6, R.137; Par. B-6, R.140; Par. C-5, R.142; Par. K-4, R.151.)

In the Conclusions of Law of the Master (which were also adopted by the District Court, R.334), the reference to such activities is in this language:

> "All of the activities of the respective plaintiffs for which recovery has been allowed under the Findings of Fact herein constitute *working time*, and, as such, are compensable and are not barred by the provisions of the Portal-to-Portal Act, under the decision of the U. S. Circuit Court of Appeals for the Eighth Circuit in the following cases: *Central Missouri Telephone Co.* v. *Connell*, 170 Fed. (2) 641; *Glenn L. Martin Nebraska Co.* v. *Culkin*, 197 Fed. (2) 981; and in the decision of the Supreme Court of the U. S., in the case of *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 89 L. ed. 124." (Italics ours.) (R.157-158.)

Central Missouri Telephone Co. v. *Connell*, *supra*, and *Glenn L. Martin Nebraska Co.* v. *Culkin*, *supra*, are distinguishable from the instant cases. In those cases, the

principal duty or primary activity of the telephone operators in the first case and the guards in the second case *was the passive act of waiting.* In the language of this Court, in *Skidmore v. Swift & Company, supra,* the employees in the latter cases "were engaged to wait". The telephone operators while on duty were waiting for calls to come in and the guards waiting for some infraction of the rules adopted for safety measures or against sabotage. That was what they were hired to do. Since the telephone operators, while sleeping, were required to answer incoming calls, and guards, while eating, were required to be armed, in uniform, and on the alert, the Court held that they were entitled to compensation therefor, since they were, during all of the time, *on duty performing the very work or activity which they were employed to do.*

Almost 90% of the total recovery in the instant cases is for activities such as those appearing in the footnote at page 30 of Appendix B to the Petition and the 7½ minute riding time allowed the guards and mentioned in the text on the same page.

A finding in the instant cases that a certain activity constituted *working time* is not equivalent to a finding that such activity is an integral part of the claimants' principal activity. The expression "working time" to designate the various activities for which a recovery was sustained, was used throughout the decisions of this Court in the following cases: *Armour & Co. v. Wantock, et al.* 323 U.S. 126 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). All of these cases were decided before and involved claims arising prior to the passage of the Portal-to-Portal Act; and, although all of the time involved in those cases was found to constitute *working time*, the expression "integral part of the principal activity" will not be found in those decisions. The

latter expression came into use by the courts following the passage of the Portal-to-Portal Act and when properly employed, was used to designate an activity which, in a given case, was so closely related to the principal activity of the claimant as to be an indispensable part thereof (such as the activity of knife-sharpening in *Mitchell* v. *King Packing Co.*, 350 U.S. 260), the right to recover for which, as overtime *under Section 4 of the Portal-to-Portal Act*, was not dependent upon a showing that it was compensable under a contract, custom or practice.

Petitioners contend that their cases are governed by *Steiner* v. *Mitchell*, 350 U.S. 247, in which this Court held that clothes changing and bathing, under the facts disclosed by the latter case, constituted an integral part of the principal activity of the claimants and was therefore compensable as working time even though there was no contract, custom or practice to pay therefor, and that such claims were not barred by *Section* 4 of the Portal-to-Portal Act. Petitioners' contention is unsound for the following reasons: (1) a finding that the respective activities of the Petitioners constitute working time is not equivalent to a finding that such activities are an integral part of the claimants' respective principal activities; (2) there is no finding in the present cases by the Master or the District Court that the activities for which a recovery is sought constituted an integral part of the principal activities of the Petitioners; (3) even if there were a finding that such activities constituted an integral part of the Petitioners' principal activities they would nevertheless be barred under the provisions of Section 2 of the Portal-to-Portal Act, since they were not made compensable by contract, custom or practice; for these cases are governed by Section 2 of the Portal-to-Portal Act and not by Section 4, which was involved in *Steiner* v. *Mitchell*, *supra*.

The burden was on Petitioners to prove the essential allegations of their amended Complaint. They have not sustained such burden, nor have they shown that the Eighth Circuit's decision is clearly erroneous under the provisions of Rule 52 of the Federal Rules of Civil Procedure. (28 U.S.C.A., Rules 52.)

III

THE DECISION BELOW IS CLEARLY CORRECT. ALL OF THE ACTIVITIES FOR WHICH A RECOVERY IS SOUGHT ARE BARRED BY SECTION 2 OF THE PORTAL-TO-PORTAL ACT

Petitioners naively argue that there is no substantial difference in the meaning or effect of Sections 2 and 4 of the Portal-to-Portal Act. We quote from their Petition:

> "The two sections are obviously substantially identical in meaning and language and identical problems arising under them demand identical treatment.
>
> "Neither the provisions of the Act nor the reasons for the Act justify a different treatment under the two sections for the same activities. Section 2 relates to activities performed prior to May 14, 1947, and Section 4 applies to activities on or after May 14, 1947. It seems inconceivable that the Congress would have intended that the same activities pursued by the same employee would be compensable after May 14, 1947, but not compensable before May 14, 1947." (Petition, 16.)

Obviously, Petitioners rest their cases upon the above contention. It amounts to saying that Congress did a futile thing in the passage of the Portal-to-Portal Act. The Circuit Court of Appeals for the Eighth Circuit, in its recent decision in *Dunning* v. *The O. O. Ordnance Corporation*, 233 Fed. (2) 902, (handed down on rehearing granted after its decision in 228 Fed. (2) 929, following the de-

cision of this Court in *Steiner* v. *Mitchell*, 350 U.S. 247, and *Mitchell* v. *King Packing Company*, 350 U.S. 260), clearly recognized the distinction between the two sections, and their different purposes and effects. And in its opinion in these consolidated cases, the Eighth Circuit has discussed the provisions of the two sections in some detail and has correctly held that it was the intent and purpose of the Congress to bar under Section 2 *all claims* for *all activities* not compensable by contract, custom or practice and arising prior to the enactment of the Portal-to-Portal Act; and at the same time the Court, in its opinion in the instant cases, made the comment that *if these cases were governed by Section 4 instead of Section 2 of the Act* it would have felt compelled to hold that the single activity of clothes-changing and bathing involved in a small proportion of these consolidated cases would have been recoverable on the theory that such activity would have constituted an integral part of the principal activity of the employees who engaged therein although there was no contract, custom or practice to pay therefor. (Appendix B, Petition, 33.)

And in *Steiner* v. *Mitchell*, *supra*, this Court recognized that the primary purpose of the Congress in passing the Portal-to-Portal Act was "to meet an 'existing emergency' resulting from claims which, if allowed in accordance with *Anderson* v. *Mt. Clemens Pottery Company*, 328 U.S. 680, would have created 'wholly unexpected liabilities, immense in amount and retroactive in operation'. This purpose was fulfilled by the enactment of Section 2. . . ."

Then this Court pointed out that *Section* 4 of the Act, which governed the activities involved in the claims in *Steiner* v. *Mitchell*, permitted a recovery "where they are an integral part of and indispensable to their principal activities" even though not made compensable by contract, custom or practice.

Petitioners in their Petition herein (Petition, 17) say:

> "This Court has held that the activities in question are compensable under Section 4 of the Portal-to-Portal Act. There is no substantial difference between the provisions of Section 2 and Section 4, and there is no justification for giving a different treatment to these activities under Section 2 than they receive under Section 4."

We challenge this statement on two grounds: First, because this Court has never held that all of the activities involved in these cases would be recoverable if Section 4 governed the issues herein. Nearly 90% of the total sum involved in the judgments herein represents recoveries for walking, riding, waiting for buses, unloading from buses and waiting to clock out, etc. (See text and footnote, Appendix B, on page 30 of the Petition.) These are typical preliminary and postliminary activities which are barred even under Section 4, unless made compensable by contract, custom or practice. And Second, because Petitioners are saying, in effect, that the Court was not justified in its opinion in *Steiner* v. *Mitchell*, in making a distinction between the purposes and effects of Sections 2 and 4.

The Chief Justice, in the opinion in *Steiner* v. *Mitchell*, cited the colloquy between Senator Cooper and other Senators in the Senate when Senator Cooper was speaking on behalf of the Committee Bill to show that it was the intent of the Congress to preserve causes of action under future claims arising under Section 4 based upon an activity which was an integral part of the principal activity of the worker. (See Appendix to opinion in *Steiner* v. *Mitchell*, 350 U. S., at page 256.)

The remarks of Senator Cooper and the questions propounded to him by Mr. McGrath and Mr. Barkley were

all directed to the *intent and purposes of Section* 4 and its effect on an activity which constituted an integral part of the principal activity. This is clearly shown by the preliminary statement of Mr. Cooper found at page 2296 of Volume 93, Part 2, of the Congressional Record which preceded the aforesaid colloquy, namely: "*Mr. President, I should now like to pass to the provisions of the bill as to future claims.*"

If it be kept in mind that the expression "principal activity" is nowhere found in any provision of Section 2 of the Portal-to-Portal Act but that its use is confined to the provisions of Section 4 of the Act, it is apparent that the expression "integral part of the principal activity" should not be used in connection with any claim arising under Section 2, but is properly applied only to claims arising under Section 4 for it was the intent of the Congress to bar under Section 2 *all claims* for "any activity" (all activities) not compensable by contract, custom or practice *without regard to whether or not such claims were or were not based upon the type of activity which they intended to preserve under Section* 4 *under the definition of "integral part of the principal activity"*. If this is kept in mind, the intention of Congress with respect to the different effect of the two sections is made crystal clear.

In the course of the opinion in *Steiner v. Mitchell*, this Court said:

> "On the whole it is clear, we think, that while Congress intended to outlaw claims prior to 1947, for wages based on *all employee activities* unless provided for by contract or custom of the industry, *including, of course, activities performed before or after regular hours of work*, it did not intend to deprive employees of the benefits of the Fair Labor Standards Act (as to claims arising after the enactment of the Portal-to-Portal Act) where they are

an integral part of and indispensable to their principal activities." (Italics ours.)

We have taken the liberty of inserting in the above quotation the parenthetical statement "as to claims arising after the enactment of the Portal-to-Portal Act" because we think, as did the Circuit Court of Appeals for the Eighth Circuit in its opinion in the instant cases, that this Court, in the latter part of the above quotation, was referring only to claims arising under Section 4. (See Appendix B, page 34 of the Petition.)

Yet, despite the decision in *Steiner v. Mitchell*, counsel for Petitioners argue that "It seems inconceivable that the Congress would have intended that the same activities pursued by the same employer would be compensable *after* May 14, 1947, but not compensable *before* May 14, 1947".

Since this Court, in the Steiner case, was primarily concerned with the proper construction to be placed upon the provisions of Section 4 of the Portal-to-Portal Act rather than Section 2, the Court, in citing an excerpt from the Senate debate on the Committee Bill, referred only to a portion of the debate dealing with the intent and purpose of Section 4. (See Appendix to opinion of the Court in *Steiner v. Mitchell, supra.*) We trust that we will not belabor the point if we quote some additional excerpts from the debate on the Committee Bill in both the House and the Senate to show conclusively what was in the mind of the Congress in passing Section 2 of the Portal-to-Portal Act.

Mr. Gwynne had been the author of the original bill in the House (H.R. 2157) and had been one of the House Committee which had conferred at length with a Senate Committee, one of whose members was Senator Cooper, in order to try to harmonize the views of the House and Senate with respect to the provisions of the proposed

Portal-to-Portal Act. As a result of the conferences between these two committees, a final bill, later referred to as the Committee Bill, was drafted which embodied essential elements of the original House Bill and the Senate Bill. Section 2 of the Committee Bill, in substantially the same form, had been a part of the original House Bill; while that provision which became Section 4 of the Committee Bill was a part of the Senate Bill. After the two committees had agreed upon the Committee Bill, Mr. Gwynne undertook to explain its provisions to the House, and we now quote a statement made by him:

> "Mr. Gwynne of Iowa. Mr. Speaker, I am sure every person connected with this conference will agree that we had a full and free conference. I shall explain very briefly what is in the conference report, comparing it as far as possible with the provisions of the original bill.
>
> "The first part of the bill had to do with existing Portal-to-Portal claims which you will recall are defined as causes of action or claims seeking pay for activities, which activities at the time they were performed were not compensable, either by custom or practice in the employment, or by contract between the employer and the employee or his representative.
>
> "*The bill as it comes from the conference bans all existing claims of such character.* It provides that the courts have no jurisdiction to entertain suits or enter any judgment whatever in this type of case. That is substantially the same as the original House provision." Congressional Record, Vol. 93, Part 4, page 4388.

And we again quote Mr. Gwynne:

> "Mr. Gwynne of Iowa. I yield to the gentleman from Georgia.
>
> "Mr. Pace. It was not entirely clear to me on the Portal-to-Portal pay what was done with the

future handling of those claims that immediately precede the moment of employment, not the walking and the riding, but the preliminaries to start work. What disposition did the committee of conference make of that type of claim?

"Mr. Gwynne of Iowa. That type of Portal-to-Portal claim is barred. In existing claims, the entire time is barred, even though the so-called Portal-to-Portal claim may arise in the middle of the day, during the hours for which the man is employed. . . .

"Mr. Pace. Even though it involves the laying out of work the man is going to undertake in the next few minutes, the laying out of garments to work on that claim would be barred?

"Mr. Gwynne of Iowa. It is barred unless there was an agreement or custom to pay for it." Congressional Record, Vol. 93, Part 4, page 4389.

And the following quotation is taken from the colloquy between Mr. Hinshaw and Mr. Walter in the House during discussion of the Committee Bill:

"Mr. Hinshaw: The gentleman remembers the cases known as the stand-by cases which were brought out before his committee in which certain employees might be called upon at sometime not during their regular working time to perform some duty and that many suits for wages have been instituted under that type of claim. Is that provided for in the present bill?

"Mr. Walter: Yes; we feel that under the language of Section 2 (b) of this bill that type of arrangement is covered *and that the employer is not liable.*" (Italics ours:) Congressional Record, Vol. 93, Part 4, page 4389.

We now pass to the debate in the Senate on the Committee Bill. Mr. O'Mahoney had just read the provisions of Section 2 (a) and then made a comment thereon as follows:

"To my mind, that language has only one meaning. It says, in common parlance, that the Fair Labor Standards Act, the Walsh-Healey Act, and the Bacon-Davis Act gave certain statutory rights to workers; and it also says that those rights which may have accrued under those particular laws prior to the day on which this bill becomes law are to be withdrawn unless they fall into categories (1) and (2) (there referring to the provisions of sub-paragraphs (1) and (2) of Section 2 (a)"). Am I correct about that?"

"Mr. Cooper. There is absolutely no question about the answer to the question, which is that if the activity for which the worker claims compensation was not compensable under a custom or contract, *and if such activity occurred prior to the date of enactment of this Act*, the employee cannot recover minimum wages, cannot recover overtime compensation, cannot recover liquidated damages. *That is the purpose of this bill.*" (Italics ours.) Congressional Record, Vol. 93, Part 2, page 2295.

Senator Pepper of Florida was one of the most outspoken critics of the proposed Act. He was greatly concerned over the fact that the Committee Bill proposed to wipe the slate clean of *all claims* for *any and all* activities arising prior to the enactment of the *Committee Bill*, even though many of the activities so barred constituted activities which were so closely related to the primary duties or work of the employee as to constitute an integral part thereof and be indispensible to the performance of the same. Since counsel for petitioners bases his principal argument in the instant cases upon the contention that (1) the activities for which the petitioners seek a recovery were an integral part of the respective principal activities in which they were employed, and (2) that it was not the intent of the Congress in the enactment of Section 2 of the Portal-to-Portal Act to bar a claim based upon such

an activity, we ask the indulgence of the Court while we quote from Senator Pepper's remarks:

"Mr. Pepper . . .,

"I cite a second illustration, given not by the Senator from Florida, but by the committee itself, as entitled to compensation:

> "'In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes, distributes clothing or parts of clothing at the work benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.'

"And I interpolate, by the committee itself, declared to be *in the future part of this act, subject to compensation; yet they are denied compensation under the part of the statute recommended by the committee that deals with existing claims.*

"Mr. President, that is not portal-to-portal; so this is not a portal-to-portal bill, not a bill denying portal-to-portal claims. This is a bill which denies honest workmen honest pay for the work they have done, adjudicated to be due them by the highest court in this land.

"Mr. President, is that morally, if technically, right? The committee gave these two cases merely by way of illustration. There are others—checking machinery by the worker before he begins to perform what are called his principal activities for pay; adjusting and readjusting safety equipment. After all, Mr. President, adjusting and readjusting safety equipment not only saves the man, it saves the worker for the company. He does that on the premises of the employer. It is related to his work in an essential way; yet he, like the man who checks machinery, Mr. President, would be denied pay for

work *he has done*, under the committee bill. So does the man who adjusts and readjusts safety equipment receive from this committee a prohibition of the collection of his claim in the courts of the land. Another is one engaged in repairing, oiling, or washing machines. *That would be, under the committee bill, compensable in the future but not compensable in the past.* Others are checking and sharpening tools; rest periods after arduous toil; inventory taking; periodical physical examination when performed upon the premises of the employer and required by the employer; travel time in plants or mines for some considerable time; cleaning and washing off dirt, and the like.

"Those are just a few cases, Mr. President, which have been called to my attention as claims as to existing rights that will be denied under the committee bill if it should be adopted, but would be recognized under the committee bill as to future rights. So I say that I see no reason why the committee should have made a distinction between the past and the future in the recognition of what was compensable work." (Italics ours.) Congressional Record, Vol. 93, Part 2, pages 2301-2302.

Thus, Senator Pepper, like Petitioners' counsel, argued that he could "see no reason why the committee should have made a distinction between the past and future in the recognition of what was compensable work". Plainly, he was protesting the fact that the Committee Bill, under Section 2 thereof, was barring a recovery for the identical activities which the same bill was preserving under Section 4 thereof as "an integral part of the principal activity". Nevertheless, Congress enacted the Committee Bill into law as the Portal-to-Portal Act of 1947, over the protests of Senator Pepper and its other opponents in the House and Senate.

It is, therefore, clear that it was the intent of Congress to bar, under the provisions of Section 2 of the Act,

all claims for or on account of *any activity* (*all activities*) of an employer engaged in prior to the date of the enactment of the Portal-to-Portal Act except an activity which was compensable by either "contract, custom or practice".

IV

THERE IS NO CONFLICT OF DECISIONS BETWEEN THE CIRCUIT COURTS OF APPEAL

On page 8 of the Petition it is asserted that the decision of the Eighth Circuit in the instant cases is in direct conflict with the decision of the Fourth Circuit in *United States Steel Co.* v. *Burkett*, 192 Fed. (2) 489; the decision of the Sixth Circuit in *F. W. Stock & Sons, Inc.* v. *Thompson*, 194 Fed. (2) 493; the decision of the Seventh Circuit in *Frank* v. *Wilson & Co.*, 172 Fed. (2) 712; and the decision of the Ninth Circuit in *Biggs* v. *Joshua Hendy Corp.*, 183 Fed. (2) 515. All four of these decisions can be distinguished from the decision in the Eighth Circuit in the instant cases.

In *United States Steel Co.* v. *Burkett*, the District Court found, "5. There was an express oral contract between the defendant and the plaintiffs to pay the plaintiffs for any overtime which they worked as a part of their duties in the capacity in which they were employed and the thirty minutes before the regular shift and the ten minutes period after the regular shift were made compensable by an express contract. . . ."

In *F. W. Stock & Sons, Inc.* v. *Thompson*, the District Court found as a fact that the original contract of employment embraced a forty-minute lunch period which the Company later, purely as a bookkeeping transaction, deducted from the 48-hour work week in an effort to meet the minimum requirements of the Fair Labor Standards

Act, for a 44-hour work week, and that no change was actually made in the working habits of the employees, and that they continued to do the same work during the forty minutes period for which they had originally been employed.

In *Frank* v. *Wilson & Company*, the District Court found that the overtime involved in that suit was covered by the express provision of a written contract and the Seventh Circuit, in commenting upon the testimony, stated: "We conclude that the activities of the plaintiffs were covered by an express provision of a written contract, and that the Portal-to-Portal Act of 1947, is not a bar to maintaining this action."

In *Biggs* v. *Joshua Hendy Corp.*, it apears that "appellants were employed by Appellee pursuant to the provisions of a collective bargaining agreement and the Court found that "the work for which compensation is being claimed is the same kind of work as was performed throughout the remainder of the work week".

Thus all of the activities involved in the above cases were covered by contract. In the instant cases there was no contract, custom or practice to pay for any of the activities here involved.

V

THE DECISION OF THE EIGHTH CIRCUIT IN THE INSTANT CASE DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT IN ARMOUR & COMPANY V. WANTOCK, ET AL, AND SKIDMORE V. SWIFT & COMPANY

The cases of *Armour & Co.* v. *Wantock*, et al, 323 U. S. 126; and *Skidmore* v. *Swift & Co.*, 323 U. S. 134, were both decided prior to the passage of the Portal-to-Portal Act. Counsel for Petitioners argue that, because the decisions in those cases were based upon findings of fact that all

of the overtime for which recovery was allowed therein was "working time" and the Master and the District Court in the instant cases found likewise, then a recovery must be sustained despite Section 2 of the Portal-to-Portal Act. And, he further argues that, since the Circuit Court of the Eighth Circuit disallowed a recovery in the instant cases for the reason that all such "working time" was barred under the provisions of Section 2 of the Portal-to-Portal Act, because found by the Master and the District Court not to be compensable by contract, custom or practice, this results in a conflict in the decision of the first two cases mentioned with the Eighth Circuit's decision in the instant cases.

Such an argument is ineffective in the face of the Portal-to-Portal Act and the provisions of Section 2. The Armour and Skidmore cases were not controlled by the Portal-to-Portal Act, but the instant cases are.

VI

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW INVOLVED IN THESE CASES

Petitioners state in paragraph 2, bottom of page 10 of the Petition, that "the result reached by the Eighth Circuit Court is not only in conflict with the decisions of other circuits; and is not only in conflict with the express provisions of the Portal-to-Portal Act, *but it also presents a problem of great importance in the future administration of the Fair Labor Standards Act and the Portal-to-Portal Act.*" (Italics ours.)

And at the bottom of page 11 of the Petition it is stated, "Consequently, a ruling against employees for their overtime work in the instant case must necessarily call for a similar ruling in cases arising under Section 4".

We think we have amply shown that there is no merit in the above contention. The action of the Eighth Circuit Court of Appeals in holding that all of the activities involved in the instant cases are barred under Section 2 can have no possible effect upon the allowance or disallowance of future cases arising under Section 4. We have shown that it was the intent of Section 2 of the Portal-to-Portal Act to bar any and all activities not compensable by contract, custom or practice and which were based upon claims arising prior to the enactment of that act; and that it was likewise the intent of Congress to preserve to the workers under the provisions of Section 4 any activity which is so closely related to a worker's principal activity as to be an integral part thereof even though not made compensable by contract, custom or practice. It is true that approximately 90% of the present claims involve walking and riding and other "activities which are preliminary or postliminary" to the activity for which these men were employed, and that Section 4 expressly bars walking and riding time and so-called preliminary and postliminary activities unless such activity is made compensable by contract, custom or practice, but it saves to the worker the right to bargain for payment of such activities, and, as we have shown Congress intended, and this Court has already held, an activity which is an integral part of the principal activity is preserved under the provisions of Section 4 on claims arising after the enactment of the Portal-to-Portal Act, even though not made compensable by contract, custom or practice.

So far as we have been able to ascertain, these consolidated cases are the last cases pending in any circuit involving claims governed by Section 2. We think the Steiner and King Packing Company cases have already served as guides for attorneys and the courts in determining the law applicable to Section 4, and further, that if

we are mistaken in our belief that these consolidated cases are not the very last pending in any of the courts involving Section 2, then the Steiner decision nevertheless points the way to a disposition of those cases. We believe that the decision of the Eighth Circuit Court of Appeals in the instant cases has properly interpreted the decision of this Court in the Steiner case, and that the opinion of the Eighth Circuit in these cases has stated with clarity the law applicable to Section 2 of the Portal-to-Portal Act.

CONCLUSION

For the reasons herein stated, it is respectfully submitted that the petition for writ of certiorari herein should be denied.

Respectfully submitted,

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